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Fundamentals of Motion Picture Distribution Agreements

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Despite the fact most film studios and major production companies have their own distribution company affiliates in one form or another, independent production companies due to lack of adequate wherewithal have to rely on outside distribution entities. One of the most salient agreements independent production companies have to initially negotiate with such "outside" entities, most probably, is a "short form" distribution agreement. This article explores some of the most salient provisions of such agreements, to some extent, including but not limited to rights, obligations of the participants, division of receipts and expenses.

SOME BACKGROUND

Given independent production companies' reliance on outside film distributors, it behooves such production companies to properly ascertain the media in which the film is to be distributed. Often the outside distribution companies might not have specialty and wherewithal to exploit distribution rights to a film in all media. Nonetheless, depending upon the negotiating strengths of the independent production company and the credentials of the film cast and profit participants, such independent film production companies might not be completely successful.

1. RIGHTS GRANTED TO DISTRIBUTION COMPANY

For Distribution Company to grant, represent or warrant it has some rights, the production company undoubtedly has to ascertain if it certainly has such rights. The production company must ensure:

- It rightly possesses all the film elements and whether it has paid for such elements. Film elements are stored at the laboratory. Distributor rightly requests and should be granted right to make prints of the film for the distribution to start. Promotional and advertising materials are directly delivered to the distributor.
- It rightly concluded there are no liens against the picture. If the production company has any liens against the picture, the distribution might be interrupted and the production company to be liable to the distributor for any losses PLUS claims of misrepresentation, fraud, etc. Liens could be from a financier or from a guild. With respect to the financier, it could be possible the financier agrees to subordinate its lien to that of the distributor. With respect to a guild lien, usually, guild might require an assumption agreement from each distributor of the picture.
- It rightly specified the extent of the rights being granted PLUS the geographical territories PLUS time limitations to such rights. These considerations figure more prominently as the rights granted are more limited. For instance, as to geographical limitations, it must be delineated whether the rights granted cover domestic (USA and CANADA, their territories and possessions) OR Foreign (countries other than USA, CANADA and their territories and possessions).
- It rightly specified the term of such rights granted. Undoubtedly, since film is first distributed theatrically and then via other media, the distribution company seeks the maximum time possible to maximize their profits. Usually, the minimum distribution rights are for five years and the maximum is twenty years. The typical distribution rights are six years which would often enable the distribution company to recoup any advances and guaranties and make some profits. Nonetheless, some distribution companies seek rights in perpetuity. Such distribution time allocations or limitations depend in a large part upon the breadth of the rights being granted. The Agreement MUST also specify if there are any holdbacks, i.e. periods during which the distributor must wait to release the film, for instance, to coordinate with release schedules in other territories. Distribution holdbacks are extremely vital to the financial success of the movie, as availability of DVDs in Europe before release of the movie in USA could adversely and substantially impact the success of the movie distribution in the USA and its total worldwide gross in other media, as well.

2. RIGHTS GRANTED TO DISTRIBUTION COMPANY AND DISTRIBUTION COMPANY OBLIGATIONS

Unsurprisingly, there are compromises and conflicting interests between the rights and obligations of Distribution Company and those of the production company. Nonetheless, finding common ground and relying on industry norms, most often, alleviate such conflicts.

- Distribution company, understandingly and adamantly, attempts to secure rather cart blanche. Distribution company seeks to have the contractual freedom to control the timing and the extent of it distribution activities. In addition, the distribution company seeks to secure concomitantly the least amount of disturbance and interference from the production company. On the other hand, the production company's position and posture is to hold the distribution company accountable and in check. Accordingly, the contract should specify the theatrical release if contemplated, holdbacks and distribution limitations, if any.
- Distribution company might not provide an advance to the production company. Then, the production company should seek to obtain commitments from at least a minimum number of prints of the movie and minimum amount of advertising for promotion. It is often typical in a minimum budget picture, the production company seeks at least a commitment for prints and advertising equivalent to 40% of the negative costs. The number of prints will vary greatly. Nonetheless, at least, to have an effective marketing strategy at least 80-100 prints are needed only in Los Angeles and New York. On the other hand, for a wider release as many as 1000-2000 prints are needed. Given low budget films, according to Writers Guilds of America, has a budget under 2.5 million dollars, anywhere between $250,000-$$500,000 could be allocated to prints and advertising. The problem might seriously arise if the picture's budget is very close to the low-budget threshold of $2.5 million dollars. In that case, 40% of negative costs probably would be much higher than an independent distribution company would deem worthy of investing and the production company rightly deem vital in effectuating an effective marketing strategy.
- The Distribution company might also negotiate to test market the picture. Test marketing the picture would encompass showing the picture in a certain geographic area within a certain number of days from the date the picture was delivered to the distributor for example ninety days or so. The test marketing usually take place in some key markets to provide the distribution company the chance to ascertain the success or failure of financial prowess of the picture to some realistic extent. The distributor usually holds previews over the weekend to obtain reviews from the audience. It would be prudent the contract contain some provisions which specify the amount of revenues for distribution company to accept or decline the distribution. If the distribution company decides not to accept the picture's distribution under the contract, the contract should provide for reverting all rights immediately back to the production company. In addition, the production company might seek reimbursement for test marketing the picture.

3. DIVISION OF RECEIPTS AND EXPENSES

It behooves parties to a distribution agreement, even a short form, to articulate to the extent applicable, the method by which receipts and expenses are recouped and calculated. Expenses could encompass the costs of prints, advertising and publicity, among other things.

The following provides some of the methods employed in such agreements:

- The most common method would be for the distribution company to first deduct its own distribution fee from GROSS receipts and then deduct its expenses. Then, distributor company will pay the balance to the production company.
- Alternatively, albeit less frequently, the distribution company would deduct its expenses from the GROSS receipts and then allocate the balance with production company according to contractual agreements.
- Alternatively, albeit less frequently, the distribution company would split the GROSS receipts with the production company according to contractual agreements. Nonetheless, the proportion distribution company would retain is much higher relative to what allocated to the production company since the distribution company is recouping its expenses from the portion retained rather than first deducting such expenses and then allocating the balance based on contractual agreements with the production company.

There are some salient considerations to be cognizant of, among which are:

- It could be beneficial for the parties even in the short form to define NET, GROSS, EXPENSES, FEES, etc.
- Distribution Fees would vary depending upon the medium or media the picture is to be distributed. Nonetheless, the parties may negotiate and agree on a single rate for all media used by the distribution company. The distribution fee in the US is often 30% of GROSS receipts; however, the fee could be anywhere from as low as 25%-40% for US distribution.
- Distribution fees for foreign theatrical distribution ranges from 15%-40% of GROSS receipts.

DISCLAIMER

This article NEITHER supplants NOR supplements the breadth and depth of such esoteric topic. In fact, this article ONLY provides a rather rudimentary synopsis of such expansive esoteric subject matter.

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